5-0400-10315-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF AGRICULTURE

In the Matter of the Cease and Desist Order Issued to Thomas D. Loyd

FINDINGS OF FACT
CONCLUSIONS
AND RECOMMENDATION

The above entitled matter came duly on for hearing before Administrative Law Judge Howard L. Kaibel, Jr., on February 16, 1996 in St. Paul, Minnesota. The record closed on March 8, 1996, upon receipt of the last filing, Respondent's amendment to his final argument.

Paul A. Strandberg, Assistant Attorney General, 900 North Central Life Tower, 445 Minnesota Street, St. Paul, MN 55101-2127 appeared on behalf of the staff of the Agronomy Services Division of the Department of Agriculture (hereinafter: "Department Staff"). Thomas Loyd, 14709 West Burnsville Parkway, #73, Burnsville, MN 55306 (hereinafter: "Respondent") appeared on his own behalf, without benefit of counsel.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Agriculture will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Elton R. Redalen, Commissioner of Agriculture, 90 West Plato Boulevard, St. Paul, MN 55107 (297-3219) to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Should Respondent be forced to comply with an order requiring him to cease applying fertilizers and pesticides as part of his lawn care service, until he obtains a license from the Department of Agriculture, pursuant to Minn. Stat. §§ 18B.33 and 18C.415?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent contracts with approximately 1200 customers to provide them with lawn care services, including applications of pre-packaged over-the-counter fertilizers and pesticides.

2. There is no evidence or allegation that Respondent has ever used or supervised the use of any "restricted use" pesticides or any non pre-packaged bulk fertilizers.

3. After unsuccessful informal efforts to convince Respondent to comply with agricultural licensing laws, including written notices and a personal phone conversation, Department Staff issued the Cease and Desist Order which is the subject of this proceeding on October 23, 1995.

4. Respondent duly filed an objection contesting this Order and demanding an administrative hearing on the jurisdiction for its issuance on December 6, 1995.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Notice of Hearing is in all respects proper with regard to form, content, execution and filing.

2. That all other procedural and substantive requirements of law and rule have been duly complied with.

3. That the Administrative Law Judge and the Department of Agriculture duly acquired and now have jurisdiction to hear this matter pursuant to Minn. Stat. §§ 14.50 and 18D.301.

4. That Respondent's urban lawn care activities are not subject to the agricultural pesticide and fertilizer licensing requirements of Minn. Stat. Chapters 18B and 18C. Lawn care services are expressly regulated under Minn. Stat. § 325f.245, which explicitly distinguishes such agricultural applications.

5. That even if the agricultural pesticide licensing requirements of Minn. Stat. §§ 18B.30 and 18B.33 could be interpreted as being applicable to urban lawn services, they would not be applicable to Respondent's activities, because he does not use "restricted use" pesticides.

6. That even if the agricultural fertilizer licensing requirements of Minn. Stat. § 18C.415 could be interpreted as being applicable to urban lawn services, they would not be applicable to Respondent's use of pre-packaged fertilizers which are specifically exempted from the definition of fertilizers regulated by that section, pursuant to Minn. Stat. § 18C.005, subd. 11 and Minn. Rules 1510.0371, subp. 7 and 1510.0400, subp. 3.

7. That the licensing provisions of Minn. Stat. §§ 18B.33 and 18C.415 as they were intended to be interpreted by the lawmakers who adopted them, do not apply to Respondent's lawn care business.

8. That the Commissioner of Agriculture should rescind the Cease and Desist Order issued to Respondent.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of Agriculture rescind the Cease and Desist Order issued to Thomas Loyd.

Dated this 18th day of April 1996.

HOWARD L. KAIBEL, JR.
Administrative Law Judge

Reported: Taped, not transcribed.

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

It is important, at the outset of this brief explanation of the reasoning involved in the attached report, to emphasize that most of Respondent's arguments have been rejected. It would needlessly prolong this Memorandum to elaborate on the rationale for rejecting each and every contention. Respondent should be reassured that all of the points he raised have been carefully considered and that none have been ignored. Department Staff should be reassured that none of Respondent's premises or arguments form the basis for the attached recommendation unless they are specifically adopted or adverted to in the Conclusions section of the attached Report or subsequently in this Memorandum.

For example, nothing in the attached Report should be misconstrued as endorsing or being predicated even tangentially upon Respondent's purported defense that he is a "natural born white male". Respondent's race and/or gender and/or any other circumstances of his birth do not excuse him in any way from licensure. Respondent is admonished in future legal proceedings to consider that raising such irrelevant and specious polemics tends to distract officials and decision makers from critical examination of the merits of other more cogent submissions.

The recommendation in the attached Report is further not based on his contention that:

- Persons doing lawn work on his behalf are "independent contractors" versus employees. The distinction might have significance if Mr. Loyd functioned solely as a supplier of materials who did none of the actual applying personally, but he has not alleged such an arms length relationship.

- Licensing obligations were affected in some way when he dissolved his corporate status and began doing business as a sole proprietor. Whether he is incorporated or not does not affect his status as a "person" under the licensing statutes. Indeed, perhaps he should reconsider incorporation because the legal fiction involved in functioning as a corporate "person" probably afforded him some protections from personal liability.

- The Department Staff officials committed procedural or due process errors in their dealings with Respondent and the people doing work on his behalf. Although the issues raised have not been researched in depth, there are no readily apparent legal missteps in the way the officials have proceeded to notify Respondent of their belief that he must do more than he has done to comply with the statutes. On the contrary, Department Staff could arguably have used much more heavy handed approaches, including sanctions. They have displayed commendable restraint and civility, according Respondent a full and fair opportunity to present his viewpoints.

- Respondent has a legal right as a "private citizen" to contract his labor "quid pro quo" to care for lawns on private property without licensure. Nothing in the attached Report should be misconstrued as questioning in the slightest the right of the legislature to require a license to engage in lawn care activity, <u>if</u> they were to clearly express their intent to do so in the statutes. There should be no doubt that Minnesota lawmakers could require licensure of anyone engaged in virtually any kind of horticulture, including cultivating lawns, regardless of whether the person is a public employee or a private citizen, whether the cultivation takes place on public or private property, with or without contracts and/or compensation, including utilization by anyone of non-"restricted use" and over-the-counter, pre-packaged and/or bulk chemicals and fertilizers of every sort concoctable.

- Department Staff has not shown a "compelling state interest" in regulating the Respondent's activities. That issue has not been reached and no opinion is properly expressed or implied herein regarding this assertion of Respondent, given the conclusion that the statute was not intended to apply to his activities. The attached Report concludes that the regulations in the statute have been adopted to license and control major applicators of agricultural chemicals, in response to real concerns of regional groundwater contamination from such agricultural practices and that the licensing controls were sought by the major applicators themselves, accepting government oversight in return for explicit statutory limitation on their own potential liability for such pollution. Because the law is interpreted herein as being limited to these major agricultural sprayers, it would obviously be inappropriate to assess how "compelling" a case has been made for licensing all of the other potentially licensable individuals such as lawn

services, hired hands, residential caretakers and gardeners who make use of some prepacked fertilizer or spray in a non-agricultural context. Such an analysis could of course be undertaken on remand, if the Commissioner deemed it important to a complete record.

- Similarly, the question of personal civil liability of Department Staff for allegedly exceeding their statutory authority is not properly dealt with herein. That issue can only be raised and considered if Respondent seeks "redress through the District Courts" against these officials, as he suggests he may do in his post-hearing brief. No opinion is expressed or intended herein regarding those issues. Note that Minn. Stat. § 18D.311 appears to limit damages against the Department for wrongful issuance of Cease and Desist Orders to "Court" action. The legislature evidently explicitly limited the damages issues to judicial actions as opposed to this administrative hearing testing the validity of the Order. The judicial forum is also the appropriate place to raise constitutional issues.

Legislative Intent

It is arguably improper to resort to any examination of the legislative history of the statute in this case, because the letter of that law and the duly adopted rules is clear and unambiguous. Minn. Stat. § 645.16 provides that:

> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

The letter of the law in Minnesota as applied to this situation draws an explicit distinction between lawn care services and farmers. Farmers produce agricultural commodities for sale, while lawn care services maintain and trim peoples' ornamental turf. When legislators mean to regulate lawn services, the statutes reference them unequivocally, for example in Minn. Stat. § 297A.01, subd. 3(i) (vi) exempting "lawn care, fertilizing" from sales taxes.

"Lawn care service" businesses are regulated in Minn. Stat. § 325f.245 which explicitly excludes in subdivision 6 (1):

> Pesticide, fertilizer, or chemical applications for the purpose of producing agricultural commodities or any commodity for sale.

Agricultural pesticide and fertilizer applicators are exempted from the lawn care services law, because these applicators are regulated separately in Minn. Stat. Chapters 18B and 18C which deal respectively with agricultural pesticides and fertilizers. The only way the legislators could have stated this distinction any more definitively, would have been to repeat, redundantly, in Chapters 18B and 18C that agricultural applicators do not include lawn care services.

That should end the inquiry. The lawmakers have stated the distinction clearly and succinctly. Lawn care services are not subject to the laws licensing applicators of agricultural chemicals.

However, in the interests of judicial economy, to avoid the necessity of remand in the event the Commissioner disagrees with this interpretation, it is also clear on further analysis that the provisions of Minn. Stat. Chapter 18B and 18C and their interpretive rules also independently exempt Mr. Loyd's activities. Assuming, for the sake of analysis, that legislators could have intended lawn care services to be included under Chapters 18B and 18C, his activities would still be exempt, because he uses only pre-packaged fertilizers and over-the-counter non "restrictive-use" pesticides.

The pesticide applicator licensing provisions of Chapter 18B are preceded by Minn. Stat. § 18B.30:

> Pesticide Use License Requirement A person may not use or supervise the use of a restricted-use pesticide without a license or certification required under §§ 18B.29 to 18B.35 **. . .** (emphasis added)

It is one of these provisions, Minn. Stat. § 18B.33, that Department Staff seeks to apply in this proceeding to the Respondent.

There does not appear to be any way that the letter of this law could be spelled out any more clearly -- the certification requirement attaches only to applicators of restricted-use pesticides. The rules promulgated by the Commissioner of Agriculture supplementing this licensing statute (Minn. Rule 1505.1100 Restricted Use Pesticides -- Display for Sale) requires that dealers post a warning sign reading "USER MUST BE CERTIFIED" only for restricted-use pesticides.

If legislators had not limited the pesticide license requirements in 18B to restricted-use pesticides, then every farm hand or gardener or groundskeeper in the state applying any kind of non restricted pesticides, including the most harmless of herbicides and fungicides such as athlete's foot powder would have to be licensed by the Department of Agriculture. If the user did it for any kind of compensation, s/he would have to obtain a "commercial applicator" license complying with all of the requirements for such certification, including passing a "closed book, monitored examination" and furnishing proof of financial responsibility demonstrating net assets of $50,000 or an equivalent bond.

To interpret the statutes and rules as requiring certification for all users of any kind of non restricted-use pesticide or fungicide, would obviously be unreasonable, if not absurd. The legislature has further provided in its mandates for construing statutes that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable." (Minn. Stat. § 645.17). The statutes and rules definitively avoid any such exaggerated application by plainly limiting the licensing authority or jurisdiction solely to "restricted-use" pesticides.

The agricultural fertilizer applicator licensing provisions of Minn. Stat. Chapter 18C also contain a similar explicit exemption for every day use of over-the-counter, pre-packaged, lawn fertilizers such as those used by Respondent. The definition of "fertilizer" subject to the Chapter's provisions, in Minn. Stat. § 18C.005, subd. 11, in the last sentence specifically excludes "other products exempted by rule by the Commissioner." The rules adopted by the Commissioner pursuant to Minn. Stat. § 17.725 (the predecessor statute which was recodified as 18C) specifically exempt pre-

packaged fertilizers in the definition sections relating to both "liquid commercial fertilizer" in Minn. Rule 1510.0371, subp. 7 and "dry commercial fertilizer" in Minn. Rule 1510.0400, subp. 3.

It is thus manifest that the legislature and the Commissioner have similarly expressly avoided any nonsensical expansion of the agricultural fertilizer licensing law by carefully limiting it to major applicators of bulk chemicals.

In short, this "assuming arguendo" extended-analysis of the hypothetical application of the agricultural statute to lawn services leads inexorably to the same conclusion. The letter of the agricultural law would also expressly exempt Respondent and others using pre-packaged fertilizers and non restricted-use pesticides from licensure.

Again, that should terminate the inquiry. The clear cut words of the law cited by Department Staff, without any further research into the legislators' intentions, do not require licensure. The cited statute is limited to users of bulk fertilizers and restricted-use pesticides.

However, in the interest of judicial economy, solely to minimize the potential for any delay due to remand, a preliminary look was also taken at the legislative history of the cited statute. The tape of the initial Senate Agriculture Committee hearing on March 22, 1987, for SF717, which added the licensing provisions, indicates that legislators were told that the law was proposed to deal with rural farm pesticides and fertilizers. The chief witness in favor of the bill was a Mr. Salstrom, representing rural agricultural pesticide dealers and applicators. He claimed to speak for an estimated two-thirds of the rural dealers and for most of the large "custom" applicators of bulk chemicals -- specialists who contract with multiple farmers to spread pesticides on their corn and soy bean fields, to make economical use of massive equipment costing $80,000.00 to $100,000.00. The legislation was prompted by reports of suspected regional contamination of ground water supplies by agricultural chemicals. The licensing provisions of the bill were supported generally by this association of chemical distributors (although they argued that the applicator fees were exorbitant) as quid pro quo for provisions limiting their potential legal liability in the event of lawsuits seeking damages for pollution or contamination of ground or surface waters. There was no suggestion in the Committee deliberations reviewed that the law could also be applied to smaller scale non agricultural urban groundskeepers or lawn care services using pre-packaged over-the-counter turf supplements.

This review of the legislative history was intentionally kept brief and preliminary. If the Department Staff believes that more extensive research into the legislative history would lead to a different conclusion, a motion to reconsider would certainly be appropriate. Similarly, if the Commissioner concludes that more exhaustive research is merited, the case can be remanded for that purpose.

However, it bears repeating, that there is no need in this case for any review of legislative history. The words of the legislation are clear and to the degree that there is room for the slightest doubt, it must be resolved in favor of Respondent. The law on the subject is well settled, as summarized in Corpus Juris Secundum, Volume 53, Licenses § 14:

Where the legislative intent is clear, such intent should be effectuated. The legislative intent should be arrived at, if possible, from the language of the enactment itself, which ordinarily should be interpreted according to approved usage and popular meaning. **. . .** Statutes and ordinances imposing licenses and business taxes are generally to be construed liberally in favor of the citizen and strictly against the government, whether state or municipal, especially where they provide penalties for their violation. Moreover, license laws cannot be extended by construction. Accordingly, if the enactment is not clear and positive in its terms, or if it is reasonably open to different interpretations through the indefiniteness of its provisions, every doubt as to construction must be resolved in favor of the one against whom the enactment is sought to be applied.

HLK